Supreme Court, U.S.
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No. 90-1629

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC.,
RICHARD A. BAUMGART, TRUSTEE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Section 106 of the Bankruptcy Code governs the sovereign immunity of governmental entities in bankruptcy proceedings. This Court granted review in this case to decide whether Section 106(c) of the Code waives federal sovereign immunity from a monetary recovery in bankruptcy. See Pet. (I) (question presented). Respondent nonetheless devotes very little attention to Section 106 in its 47-page brief. Instead, respondent dedicates the first part of its brief to arguing that the Code's waiver of sovereign immunity is concealed in 28 U.S.C. 1334, which grants jurisdiction over bankruptcy cases to the district courts. In the second part of its brief, respondent pays only glancing attention to the language of Section 106, devoting its attention instead to other

Code provisions and to legislative history. Nowhere in its brief does respondent provide a persuasive reason why Section 106(c) should be interpreted to authorize monetary recovery from the United States in the face of this Court's holding in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), that Section 106(c) does not authorize monetary recovery from the States.

A. The Grant of Jurisdiction in 28 U.S.C. 1334 Is Not a Waiver of Sovereign Immunity

In *Hoffman*, this Court looked to Section 106 to determine the scope of the States' sovereign immunity from monetary recoveries in bankruptcy. Respondent argues, however, that "[c]laims or assertions of sovereign immunity" in bankruptcy cases are governed, not by Section 106, but instead by 28 U.S.C. 1334. Resp. Br. 4. Section 1334 of title 28 grants the district court in which a bankruptcy case is commenced "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. 1334(d). Respondent contends that, notwithstanding any assertion of sovereign immunity, under Section 1334 the court may compel either a State or the United States to return any property, including money, that passes into the estate upon commencement of a bankruptcy case. Resp. Br. 4-15. Respondent's novel theory—not advanced in the court of appeals—is plainly without merit.

In fact, this Court rejected a very similar argument just last Term in *Blatchford* v. *Native Village of Noatak and Circle Village*, 111 S. Ct. 2578 (1991) —a case respondent does not even cite. In *Blatchford*, the Court held that the Eleventh Amendment barred a suit by native villages in Alaska seeking monetary recovery from the State under a state revenue-sharing law. In so holding, the Court rejected the Villages' contention that immunity to the suit had been abrogated by 28 U.S.C. 1362, which grants district courts jurisdiction over "all civil actions, brought by any Indian tribe * * * aris[ing] under the Constitution, laws, or treaties of the United States." *Blatchford*, 111 S. Ct. at 2588. The Court determined that Section 1362 did not satisfy the clear-statement requirement for abrogations of Eleventh Amendment immunity, nor even the "minimal clarity requirement" that the Villages contended should apply. 111 S. Ct. at 2585. The Court observed that "the text [of Section 1362] is no more specific than [28 U.S.C.] § 1331, the grant of general federal-question jurisdiction to district courts, and no one contends that § 1331 suffices to abrogate immunity for all federal questions." *Ibid.* The Court also rejected the Villages' argument on broader grounds: "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id.* at 2585 n.4. Having determined that "§ 1362 does not enable tribes to overcome Alaska's sovereign immunity" (*id.* at 2586 n.5), the Court concluded that monetary recovery was barred.

Respondent makes the same mistakes that the Villages made in *Blatchford*. The jurisdictional provision on which respondent relies, 28 U.S.C. 1334, is no more specific than the general grant of federal question jurisdiction in 28 U.S.C. 1331; general grants of jurisdiction cannot be construed to waive

sovereign immunity. *Blatchford*, 111 S. Ct. at 2585.[1] Moreover, respondent confuses the issue of the bankruptcy courts' jurisdiction with the separate issue of their authority to award monetary relief against the sovereign; the two issues are "wholly distinct." *Blatchford*, 111 S. Ct. at 2585 n.4. The issue of sovereign immunity under the Bankruptcy Code is governed by Section 106 of the Code, not by 28 U.S.C. 1334. Section 1334 has nothing to do with sovereign immunity.

This Court's decision in *Hoffman* also requires rejection of respondent's argument regarding 28 U.S.C. 1334. The trustee in *Hoffman* was barred from recovering payments that the State owed under its Medicaid contract with the debtor. 492 U.S. at 99. There was no dispute, however, that the State's indebtedness constituted "property of the estate" within the bankruptcy court's exclusive jurisdiction under 28 U.S.C. 1334. See *Hoffman*, 492 U.S. at 100 (trustee sought to recover Medicaid payments under 11 U.S.C. 542(b), which authorizes recovery of indebtedness "that is property of the estate"). Respondent contends (Resp. Br. 9) that "[t]he sovereign immunity of the States or the United States d[oes] not prevent a bankruptcy court from compelling the return of property which [is] part of the bankruptcy estate." Thus, under respondent's theory, the trustee in *Hoffman* was entitled to recover the money that the State

[1] See also *United States* v. *Mottaz*, 476 U.S. 834, 846 (1986) ("That federal courts may have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians does not therefore mean that the United States has waived its immunity in cases where an Indian challenges the United States' claim of title in its own right.") (citation omitted).

owed to the debtor because that money was "property of the estate." That theory cannot be reconciled with the result in *Hoffman*.

Contrary to respondent's assertion (Resp. Br. 6-11), there is no support for its theory in "the line of cases dealing with *in rem* jurisdiction" decided under the bankruptcy laws in effect prior to the 1978 Code. Respondent's reliance on these cases is misplaced for several reasons.

First, this case does not involve a *res*; it involves money. This is not one of those rare cases in which money can be the subject of an *in rem* proceeding. The funds that respondent sought to recover have long since been paid into the United States Treasury, as required by statute. See 31 U.S.C. 3302(c)(1); 31 U.S.C. 3720; 26 U.S.C. 7809. There is, therefore, no *res* to which a court's *in rem* jurisdiction could attach. See *Pennsylvania Turnpike Comm'n* v. *McGinnes*, 268 F.2d 65, 66-67 (3d Cir.), cert. denied, 361 U.S. 829 (1959). In any event, respondent did not seek an *in rem* remedy by requesting recovery of "particular dollars," cf. *Begier* v. *IRS*, 110 S. Ct. 2258, 2264 (1990); it sought only to recover a specific sum, J.A. 16. The bankruptcy court accordingly did not purport to exercise *in rem* jurisdiction; it simply entered a money judgment against the IRS. Pet. App. 52a. Thus, contrary to respondent's assertion, this case certainly *does* "involve a claim to funds payable out of the public treasury" (Resp. Br. 4).[2]

[2] It is clear that, if Nordic Village were not in bankruptcy but the facts were otherwise the same, Nordic Village could not recover the transfer at issue here. See *Pennsylvania Turnpike*, 268 F.2d at 66-67 (tax payment deposited into the Treasury cannot be recovered under replevy statute, 28 U.S.C. 2463); see also *Snodgrass* v. *United States*, 834 F.2d 537, 539 & n.2 (5th Cir. 1987) (actions under refund statutes, 28

Because respondent sought relief that would "expend itself on the public treasury," its suit is plainly one against the sovereign, even assuming *arguendo* that in some sense it could also be characterized as a suit against an identifiable *res*. *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); see also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949). Respondent does not cite any decision of this Court (and we are aware of none) supporting respondent's notion that a bankruptcy court can exercise its *in rem* jurisdiction to override sovereign immunity.[3]

U.S.C. 1346(a)(1) and 26 U.S.C. 7422, can be brought only by taxpayers, not by third parties); *Transamerica Ins. Co.* v. *Long*, 318 F. Supp. 156 (W.D. Pa. 1970) (court lacks jurisdiction under 28 U.S.C. 1340 or 28 U.S.C. 1342 over suit by victim of theft against tax official to whom thief paid stolen money to satisfy personal tax liability); cf. 26 U.S.C. 7426 (authorizing persons other than taxpayers under certain conditions to sue United States for wrongful levy on property). Respondent does not explain why a different result should obtain in the bankruptcy context. See S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978) (proposed Section 106 was "designed to achieve approximately the same result that would prevail outside of bankruptcy").

[3] The decisions of this Court that respondent cites (Resp. Br. 7-9) concern the exercise of *in rem* jurisdiction over property in the hands of private persons, not governmental entities. Thus, none of those decisions addresses sovereign immunity. The lower court decisions that respondent cites (Resp. Br. 9-10), with one exception, are cases in which a governmental entity filed a claim against the estate and was thereby found to have waived sovereign immunity to certain claims of the estate. See *In re Pacific Far East Lines, Inc.*, 889 F.2d 242 (9th Cir. 1989) (bankruptcy court ordered the government to refund part of the money that it received as a settlement of the government's claim against the estate because the settlement sum exceeded a statutory maximum that was enacted after settlement but before conclusion of the

On the contrary, in two cases decided the same day, one of which arose under the prior bankruptcy law, this Court made clear that a court cannot exercise *in rem* jurisdiction over an unconsenting sovereign. In *United States* v. *Shaw*, 309 U.S. 495 (1940), the Court held that the United States did not, by filing a claim against a decedent's estate in state court, waive its sovereign immunity to a cross-claim by the estate. The Court rejected as irrelevant the estate administrator's "[e]mphasis * * * upon the fact that these probate proceedings are in rem or

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bankruptcy case); *In re Pittsburgh Rys.*, 253 F.2d 654 (3d Cir. 1958) (similar facts, except the intervening change in law resulted from judicial decisions); *In re Greenstreet, Inc.*, 209 F.2d 660 (7th Cir. 1954) (government filed a claim against the estate based on government contract, and trustee recovered on compulsory counterclaim); *In re Madden*, 388 F. Supp. 47 (D. Idaho 1975) (court reconsidered, and reduced, amount that government had received based on its claim against the estate). The result in these decisions reflects the principle currently embodied in Sections 106(a) and 106(b) of the Code, under which a governmental unit is deemed to waive sovereign immunity to certain claims when it files a claim against the estate. The decisions are thus inapposite here, since respondent does not seek recovery under Section 106(a) or 106(b). The solitary district court decision that arguably supports respondent's position was, in our view, wrongly decided. *In re Reiber's Inn*, 3 Bankr. 706 (S.D.N.Y. 1980). In upholding monetary recovery against a state agency that had not filed a claim against the bankruptcy estate, the court in *Reiber's Inn* erroneously relied (*id.* at 708) on this Court's decision in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). In *Gardner*, however, the Court held that sovereign immunity did not bar a bankruptcy court from determining the allowable amount and priority of a State's claim against the estate for delinquent taxes. 329 U.S. at 573-574. The Court in *Gardner* emphasized that in that case "[n]o judgment [was] sought against the State." *Id.* at 574. Cf. 11 U.S.C. 505(a).

quasi in rem." *Id.* at 502. In *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), the Court relied on its decision in *Shaw* in refusing to accord *res judicata* effect to a prior judgment against the United States that had been entered upon a trustee's cross-claim in a bankruptcy proceeding. *Id.* at 512-515. The Court concluded that, while the bankruptcy court had authority in the prior proceeding to adjudicate the United States' claim against the estate, "[n]o statutory authority granted jurisdiction to the [bankruptcy] [c]ourt to adjudicate a cross-claim against the United States." *Id.* at 512.

As discussed in our opening brief (U.S. Br. 6-8), "[i]t long has been established * * * that the United States, as sovereign, is immune from suit save as it consents to be sued," *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (internal quotation omitted), and that such consent "cannot be implied but must be unequivocally expressed," *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990). This Court's decisions in *Shaw* and *USF&G* demonstrate, contrary to respondent's submission, that no "*in rem*" exception to these principles obtains in bankruptcy cases.[4]

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[4] In addition to its theory that *in rem* jurisdiction overrides sovereign immunity, respondent also resorts (Resp. Br. 15 n.6) to the law of trusts. Here too, respondent erroneously assumes that decisions involving private entities may be applied wholesale to the sovereign. Respondent cites only one decision of this Court involving the government, *Bull* v. *United States*, 295 U.S. 247 (1935). That decision concerned equitable recoupment, a narrow doctrine that has no bearing in this case. See *United States* v. *Dalm*, 110 S. Ct. 1361, 1368 (1990) ("[O]ur decisions in *Bull* and [a later case] stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction.").

B. Section 106(c) of the Bankruptcy Code Does Not Authorize a Bankruptcy Court to Order the United States to Pay Money to a Bankruptcy Trustee

When respondent turns to the question presented here, it repeats the court of appeals' analysis of Section 106(c) of the Bankruptcy Code. As we explained in our opening brief, the court of appeals erred at every turn in concluding—contrary to the conclusion of a plurality of this Court in *Hoffman*—that Section 106(c) authorizes monetary recovery from governmental units. The additional arguments that respondent advances only compound the court of appeals' errors.

1. Respondent, like the court of appeals, relies on purportedly different rules of statutory construction to defend interpreting Section 106(c) to mean one thing when applied to the States but another thing when applied to the United States. Resp. Br. 20-21. As explained in our opening brief (U.S. Br. 7-9), the court of appeals was wrong to treat the scope of federal sovereign immunity under Section 106(c) as "a simple case" of statutory construction and on that basis to arrive at a different interpretation from that of the plurality in *Hoffman* (Pet. App. 12a-13a). Petitioner is even wider of the mark in urging the Court in this case to apply a rule of liberal construction diametrically opposed to the clear-statement rule applied in *Hoffman*. Resp. Br. 20-21.

For one thing, none of the decisions cited by respondent supports the broad proposition that waivers of sovereign immunity should be liberally construed. The decisions on which respondent relies concern ac-

tions under either the Federal Tort Claims Act (FTCA) or various "sue and be sued" clauses. While the Court has suggested on occasion that the FTCA may be liberally construed, the Court has based that suggestion on the FTCA's "sweeping language" and "breadth of purpose." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547, 550 (1951); see also, *e.g.*, *United States* v. *Aetna Sur. Co.*, 338 U.S. 366, 383 (1949). Those decisions are inapposite in light of Congress's clear intent in Section 106 to waive sovereign immunity only in narrowly defined circumstances. See U.S. Br. 12-14, 18-23. Decisions construing sue-and-be-sued clauses are inapposite for a similar reason. Those decisions are based on the language of such clauses—which typically is broader than the language at issue here—and on the quasi-private nature of the activities in which entities subject to sue-and-be-sued clauses typically engage. *E.g.*, *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 390-392 (1939). Far from being a quasi-private activity, the IRS's receipt of the tax payment that respondent seeks to recover is a quintessential government function.

Moreover, it would be improper to construe Section 106 liberally even if such an approach were justified with respect to other waivers of sovereign immunity. As we discussed in our opening brief, Congress clearly intended in Section 106 to treat the States and the United States the same. U.S. Br. 8-9, 18-19. Respondent never responds to that argument. Thus, he fails to explain how, consistently with Congress's intent to accord identical treatment, Section 106 can be construed to have different meanings depending on whether it is being applied to the States or the United States, solely as a result of applying different

judicial canons. Congress surely did not intend that result.[5]

2. In any event, respondent's treatment of the language of Section 106(c) does not pass muster under the most liberal standard of statutory interpretation. Although respondent does not repeat the court of appeals' error by failing to discuss subsection 106(c)(2), in the process of avoiding that mistake respondent unwittingly confirms that Section 106(c) does not authorize monetary relief. Respondent quotes dictionary definitions of the terms "determination" and "issue" in an attempt to show that the court's authority under Section 106(c)(2) to make a "determination * * * of an issue" arising under Section 106(c)(1) includes the power to make an award of money. Resp. Br. 31. The definitions upon which respondent relies, however, compel the contrary conclusion. According to those definitions, Section 106(c)(2) permits a court only to "deci[de] * * * a disputed point or question." See Resp. Br. 30 (quoting *Black's Law Dictionary* (5th ed. 1979)). Thus, the "common meaning" tendered by respondent, like the actual words of the statute, are "more indicative of declaratory and injunctive relief than of monetary recovery," *Hoffman*, 492 U.S. at 102.

Respondent does not come to grips with our argument that the structure of Section 106 confirms that courts may not award monetary relief under Section

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[5] Nor could Congress have intended for courts to arrive at different interpretations depending on whether they consulted the legislative history of the Bankruptcy Code. U.S. Br. 17-18. In failing to dispute that Congress intended to treat the States and the United States the same, respondent fails to explain why resort to legislative history is proper in this case, even though it clearly would be improper in a case involving a State. *Hoffman*, 492 U.S. at 104.

106(c). See U.S. Br. 12-14. Instead, respondent remarks only that our structural analysis "is entirely unsupported by the legislative history." Resp. Br. 30. Respondent takes a curious approach to statutory construction in suggesting that the text of a statute should be ignored unless it has the blessing of legislative history. In any event, as we discussed in our opening brief, the legislative history convincingly demonstrates that Congress did not, by adding Section 106(c) late in the legislative process and with virtually no debate, intend to restore the broad waiver provision that it had earlier rejected because of constitutional concerns. See U.S. Br. 18-21. Moreover, congressional statements made when Section 106(c) was proposed show that Congress did not intend to authorize monetary relief under Section 106(c). U.S. Br. 21-24.

3. In our opening brief, we explained that references in the legislative history to the trustee's authority under Section 106(c) to *avoid* transfers could not properly be construed as expressing an intent to authorize *recovery* of such transfers. U.S. Br. 23-24. Respondent does not dispute that the Bankruptcy Code clearly "enunciates [a] separation between the concepts of avoiding a transfer and recovering from the transferee." H.R. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977). Compare 11 U.S.C. 544-549 (authorizing avoidance of transfers) with 11 U.S.C. 550 (authorizing recovery of transfers). Respondent nonetheless reproduces the references to the trustee's avoiding powers (Resp. Br. 36), which do not become any more supportive of its position by virtue of repetition. Respondent also seizes on a reference in the legislative history to the "recovery" of tax payments by trustees. Resp. Br. 36-42. The initial difficulty

with respondent's lengthy discussion of this isolated reference is that respondent improperly treats legislative history as if it were statutory text. In any event, respondent's reliance upon this aspect of the legislative history is unavailing.

Respondent relies on a statement in the committee report on the Bankruptcy Code bill that passed in the House, H.R. 8200, 95th Cong., 1st Sess. (1978). See H.R. Rep. No. 595, 95th Cong., 1st Sess. 373 (1977). The bill included as Section 547 a provision regarding the avoidance of preferential transfers that was similar to Section 547 as enacted. H.R. 8200, 95th Cong., 1st Sess. § 547 (1977), reproduced in *Collier on Bankruptcy*, App. 3, at III-419 to III-425 (L. King, 15th ed. 1991). Section 547(b) of the bill authorized the trustee to avoid certain pre-petition transfers made in payment of antecedent debts. H.R. 8200, *supra*, § 547(b). In discussing the applicability of Section 547(b) to the payment of tax debts, the committee report stated that, even if such payments qualified as preferential transfers, "the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. 106." H.R. Rep. No. 595, *supra*, at 373.

The version of Section 106 to which the report referred did not include Section 106(c); that subsection was added later. At the time of the report, Section 106 consisted of two subsections similar to Sections 106(a) and 106(b) as enacted. H.R. 8200, § 106, reproduced in *Collier on Bankruptcy*, *supra*, App. 3, at III-324. Thus, Section 106 of H.R. 8200 provided for waiver of a governmental unit's sovereign immunity only if the governmental unit filed a claim against the estate. Section 106(a) author-

ized affirmative monetary recovery from the governmental unit with respect to compulsory counterclaims of the estate, and Section 106(b) authorized a set-off with respect to other claims of the estate.

In light of the version of Section 106 to which the committee report referred, two things are clear about the report's reference to the "recovery" of tax payments. First, its use of the term "recovery" is at best imprecise. Section 106 of the House bill plainly did not permit an affirmative monetary recovery in every case in which sovereign immunity was waived. The trustee could obtain an affirmative recovery based on a claim of a preferential tax payment only if the trustee's claim was a compulsory counterclaim with respect to the government's claim against the estate. If, on the other hand, the trustee's claim was not a compulsory counterclaim, the trustee could not "recover" anything on the claim, but rather could only set off the claim against the government's claim. Thus, the reference to "recovery" in the report is correct only in the loose sense of including the set-off of monetary claims.

In any event, because Section 106 of the bill did not include Section 106(c), the reference to "recovery" in the report cannot be read to suggest that recovery is permitted under Section 106(c). That no such inference can be drawn is confirmed by the fact that the statement in the report concerning "recovery" was deleted from the floor statements that were made in lieu of a conference report. The floor statement on Section 547(b) stated that under Section 106(c) the government was "subject to avoidance of preferential transfers," 124 Cong. Rec. 32,400 (1978) (statement of Rep. Edwards); *id.* at 34,000 (statement of Sen. DeConcini). But as we explained in our

opening brief and as respondent does not dispute, *avoidance* of a transfer is different from *recovery* of the transfer. U.S. Br. 23-24. The distinction between the two concepts is confirmed by the legislators' replacing the term "recovery" with the term "avoidance" after Section 106(c) was added.

4. Respondent argues (Resp. Br. 43-47) that the Bankruptcy Code evinces a policy to treat the United States "the same as any other creditor." That argument ignores the very existence of Section 106 of the Code, which makes clear that Congress did *not* intend either the United States or any other governmental entity to be on the same footing as private entities. The argument also ignores Congress's rejection of a broad waiver proposal that, in contrast to Section 106, would have placed governmental and private entities on the same footing. See U.S. Br. 18-19. Finally, respondent's argument ignores *Hoffman*, in which the Court recognized that Congress intended to treat the United States the same as the *States*, 492 U.S. at 103, 114, and held that the States were immune from monetary relief under Section 106(c), 492 U.S. at 101-104.

Respondent's reliance (Resp. Br. 45) on this Court's decision in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), is misplaced. *Whiting Pools* sustained the authority of a bankruptcy court to order the IRS to turn over tangible property in which the debtor retained ownership. Nothing in *Whiting Pools* suggests that an order granting a monetary recovery from the United States would have been proper. See U.S. Br. 16 n.19.

Respondent also errs in invoking (Resp. Br. 45-46) the Bankruptcy Code policy favoring equality of distribution among creditors. This Court has em-

phasized that interpretation of the Code must be governed by the language of the Code, not by policy arguments unsupported by any textual authority. *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126, 2132 n.4 (1990); see also *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991). The language of Section 106 makes it clear that Congress intended the scope of federal sovereign immunity to be the same as the scope of state sovereign immunity. Because Section 106(c) does not waive the States' sovereign immunity from monetary relief, it cannot be construed to waive the United States' sovereign immunity from monetary relief. While equality of distribution is among the policies embodied in the Code, that policy cannot be used to "create a distinction that the words of the statute do not contain." *Owen* v. *Owen*, 111 S. Ct. 1833, 1838 (1991), discussed in U.S. Br. 9 & n.10.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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